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Supreme Court of the United States

October Term, 1962

No. 350

NATIONAL LABOR RELATIONS BOARD,

Respondent,

v.

LUNDY MANUFACTURING CORP.,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The above named petitioner prays that a writ of certiorari issue to review a decision and decree of the United States Court of Appeals for the Second Circuit. The decision of the Court of Appeals, 316 F 2d 921, was handed down on April 26, 1963; the decree followed on May 15, 1963. The decree enforced an order of the National Labor Relations Board dated April 20, 1962, reported at 136 NLRB No. 128.

The opinion of the Court of Appeals and the decision of the National Labor Relations Board are printed as an appendix to this petition.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

This application presents an important question under the National Labor Relations Act which has not been but should be settled by this Court. Further, we respectfully suggest that the decision of the Court of Appeals is inconsistent with the proper interpretation and application of §9(a) and §10(b) of the Act and with principles established in this Court's prior decisions.

The questions presented are:

(1) Whether an employer, party to a valid agreement containing a grievance procedure with the collective bargaining representative of its employees, is under a duty to recognize a non-bargaining-representative grievance committee in the absence of any pending grievance.

(2) Whether the Court of Appeals may enforce an order of the NLRB upon grounds not given by the Board in its decision. *Cf. Securities & Exch. Comm.* v. *Chenery Corp.*, 332 U. S. 194, *Burlington Truck Lines* v. *U. S.*, —— U. S. ——, 9 L. Ed. 2d 207.

(3) Whether the Board, having found that unfair labor practices occurred within the limitations period of §10(b) of the National Labor Relations Act, may make its order more onerous because of alleged unfair labor practices antedating the limitations period. *Cf. Local Lodge* v. *NLRB*, 362 U. S. 411.

Statutes Involved

The relevant provisions of the National Labor Relations Act, as amended, 29 U. S. C. §§151 *et seq.* are as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. * * *

"Sec. 8(a). It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *

"Sec. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment

is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

"Sec. 10(b). * * * *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, * * *"

Statement

The order of the Board, 136 NLRB No. 128, enforced by the Court of Appeals, consolidates for decision a case against Lundy relating to events in 1957-1958, which had previously been remanded by the Court of Appeals, 286 F. 2d 424, with another case against Lundy relating to events in 1960.

The 1957-1958 Case

On May 28, 1957, Lundy signed a two-year contract with Amalgamated Local Union 355 as collective bargaining representative of Lundy's production and maintenance employees, containing a union security clause, subject to reopening as to wages at the end of one year on 60 days notice.

On this application, Lundy assumes that there was evidence to support a finding that Local 355 either did not represent a majority of Lundy's employees when the contract was executed or, if it did, that the majority was obtained by Lundy's assistance.

In March, 1958, Local 355 requested reopening as to wages and other matters. Negotiations ensued, culminating in agreement on a three-year extension of the contract from July 1, 1958, with annual wage increases and other benefits. At a union meeting on May 12, 1958, the agreement was approved by the membership.

Thereafter, a series of contract drafts passed back and forth. At a Union meeting held on July 15, 1958, where the final draft was read, disaffection appeared. Some members questioned whether the contract had previously been ratified; others taxed them with reneging on their agreement. A movement began for disaffiliation from Local 355 and affiliation with International Union of Electrical, Radio and Machine Workers (herein called IUE).

Meanwhile, employees had complained of the delay in paying the wage increases effective July 1, 1958. On July 22, 1958, Lundy posted a notice that it would pay the increase immediately. Later that day, some employees surreptitiously posted notices in the plant announcing a meeting that night to vote on disaffiliating with Local 355 and joining IUE.

On July 23, 1958, IUE wired Lundy that its employees had voted to disaffiliate from Local 355 and asked Lundy to recognize IUE as bargaining agent. IUE also distributed a leaflet at the plant which reviled the new agreement with Local 355 as a "sweetheart deal".

Two employees were discharged on July 22, and one on July 24, 1958, allegedly because they favored affiliation with IUE. The revised contract with Local 355 was ratified on July 30, and signed on July 31, effective as of July 1, 1958.

Unfair labor practice charges were filed with the Labor Board on July 30, 1958, and served on Lundy on August 1, 1958.

The Board in a decision rendered in December, 1959, 125 NLRB No. 109, adopted a finding by its Examiner:

> "Section 10(b) of the Act does not preclude a consideration of events antedating the charges by more than 6 months and Respondent's conduct, within the 6-month period, of continuing and maintaining the aforedescribed 1957 contract and of executing and maintaining the 1958 contract, constitute violations of Section 8(a) (1), (2) and (3) of the Act."

The Board also adopted findings of the Examiner, that, in view of the appearance of IUE on the scene in July, 1958, Lundy could not lawfully recognize or contract with Local 355 until the latter's right to be recognized had been determined by a Board-supervised election, and that the discharges were likewise unlawful. Accordingly, the Board directed Lundy to cease and desist from encouraging membership in Local 355 or discouraging membership in IUE and from giving effect to the 1958 contract with Local 355; to offer the three discharged employees reinstatement with back pay; and to reimburse its employees for dues and initiation fees to Local 355 deducted from their earnings.

On petition for enforcement, the Court of Appeals, 286 F 2d 424, remanded the proceeding "for further consideration by the Board in the light of the Local Lodge No. 1424, IAM v. NLRB, 362 U. S. 411." Among other things, the court held that "The Board also might treat the alleged discriminatory discharges differently in a setting wherein the 1957 agreement with Local 355 was entitled to the benefits of the contract bar rule."

The 1960 Case

Lundy continued to give effect to the contract of July 31, 1958 while the proceeding to enforce the Board's order, 125 NLRB No. 109, was pending in the Court of Appeals.

The contract of July 31, 1958 had a three-year term, effective until June 30, 1961. It provided that "any dispute * * * between the Employer and the Union or concerning the interpretation or application of any provision of this agreement * * * shall first be taken up between a representative of the Union, one or more of the Union Shop Stewards and a representative of the Employer" and, if not adjusted, should be submitted to arbitration.

In accordance with the contract, Local 355 had maintained a grievance committee in the shop. On April 11, 1960, an employee was discharged in an altercation over a grievance and several members of the Local 355 grievance committee resigned.

On April 12, 1960, several employees protested the discharge to Lundy's president, Barbato. He reduced the discharge to a one-day suspension and suggested that the employees elect a grievance committee in view of the resignation of the old one. At noon, a number of employees from the day shift attended a meeting held at a hall rented by the IUE. With the IUE representative present, they selected a 7-man committee. That afternoon, this committee demanded "recognition." Barbato refused to recognize it because it was an IUE group and suggested that another election be held at the end of the day shift so that the night shift employees could also attend.

There was no pending grievance. The committee requested recognition "in general."

On April 18, the group supporting the 7-man committee—again with only the day shift present—voted to strike if it was not recognized.

On the morning of April 19, the committee again demanded recognition which Lundy refused.

Meanwhile, on April 14, Lundy had posted notices announcing a meeting on the afternoon of April 19 for employees to elect a grievance committee. The president of Local 355 came to the plant on April 19, tore down these notices, and advised Lundy that Local 355 had a grievance committee and would not recognize any other.

On April 20, about half of the employees struck, picketing with signs reading "IUE, AFL-CIO." IUE representatives directed the strike and paid the pickets, while Local 355 representatives urged employees to cross the picket-line because it was an IUE strike.

On April 21, Local 355 held a meeting at which it elected a new grievance committee.

On May 3, the strike ended with the reinstatement of all strikers except six who had been replaced and one who was discharged during the strike.

The original charge was filed and served on April 18, 1960.

The Trial Examiner's report dated December 9, 1960 (while the 1957-1958 case was still pending before the Court of Appeals) found:

> "* * * under the Board's decision and order of December 29, there was no recognized bargaining representative of the employees, nor was any valid collective bargaining agreement covering the processing of

grievances in effect at the time. Therefore, the Company was under statutory obligation to at least accept and meet with and discuss grievances with the committee."

The Trial Examiner found that Lundy's failure to recognize this committee in April 1960, even though there was no pending grievance, transformed the strike into an unfair labor practice strike.

Thereafter, on December 26, 1960, the Court of Appeals remanded the 1957-1958 case.

The Board's Order

On April 20, 1962, the Board handed down its "Supplemental Decision and Amended Order", 136 NRLB No. 128. This consolidates without previous notice the 1957-1958 case remanded by the Court of Appeals with the 1960 case, then still awaiting original decision.

As to the 1957-1958 case, the Board held:

"* * * we now make no finding that the Respondent violated the Act in 1957, either by maintaining or by giving effect to its 1957 contract with Local 355. Such a finding would be inescapably grounded on events predating the limitations period. Nor do we find that the Respondent was faced with a valid representation claim by reason of the IUE representation petition filed in July, 1958, some 10 months before expiration of the 1957 contract's 2-year term. Under such circumstances no litigable question concerning representation came into existence at that time. We likewise do not find a violation of Section 8(a)(2) or (1) based on the Respondent's conduct in executing or maintaining in effect its 1958 contract with Local 355 after

the IUE filed its petition. In all other respects, however, we reaffirm the Section 8(a)(1), (2) and (3) violations found in our original Decision and Order of December, 1959."

With respect to the 1960 case, the Board said:

"As for the Section 8(a)(1) and (3) violations alleged in the remaining cases, we agree with Trial Examiner Hilton's findings in support of these allegations."

However, the Trial Examiner's findings had been based upon the Board's 1959 decision, that there was no recognized bargaining representative nor any valid collective bargaining agreement covering the processing of grievances in effect at the time. The Board, in registering agreement with the Trial Examiner, apparently overlooked that it had declared the 1958 contract valid; that, therefore, there was a recognized bargaining representative and a valid collective bargaining agreement covering the processing of grievances in effect at the time.

The Decision Below

The Court of Appeals noted (316 F. 2d at pp. 924-925):

"Lundy says if could not have violated §8(a)(1) by refusing to recognize an elected grievance committee which it considered to be under IUE influence, when a subsisting and valid collective bargaining agreement required it to handle grievances through Local 355. In the light of the Board's own decisions in related contexts, denial of this claim warranted much more explanation than a one-sentence approval

of an examiner's conclusion heavily resting on a premise the Board had destroyed."

The Court of Appeals, nevertheless, affirmed this aspect of the Board's order but supplied its own reason for such conclusion.

The court also upheld the Board's order directing Lundy to withhold recognition from Local 355—the collective bargaining representatives of Lundy's employees—unless and until that Union be certified. The Board had specifically held so broad an order to be proper here because of "the background (prelimitations) evidence, showing that the Respondent coerced its employees into designating Local 355 as their collective bargaining representative, and that Local 355 never was their free choice."

The Court of Appeals upheld such use of prelimitations evidence by the Board as a basis for making its order more onerous.

I

Whether the Court of Appeals may enforce an order of the NLRB upon grounds not given by the Board in its decision

The crux of the 1960 case was the Board's finding that Lundy's refusal in April, 1960, to recognize the 7-man grievance committee (elected by the day shift outside the framework of the contract with Local 355) was a violation of the rights guaranteed to employees by §7 of the Act. Therefore, the Board held that the strike which followed was an unfair labor practice strike and the discharges and refusals to reinstate violated §8(a)(3) and (1) of the Act.

The trial examiner found that Lundy was under a duty to recognize the 7-man grievance committee. The Court of Appeals observed that his finding was based upon

> "his conclusion—unwarranted, as matters turned out—that 'under the Board's Decision and Order of December 29 (1959), there was no recognized bargaining representative of the employees, nor was any valid collective bargaining agreement covering the processing of grievances in effect at the time'. * * * The Board's opinion merely registered agreement with the examiner's findings in regard to the Section 8(a)(1) and (3) violations—although, in view of its own action with respect to the 1958 case, it could not reasonably have agreed with the passage just quoted". (316 F. 2d at p. 924).

Lundy argued that it could not have violated §8(a)(1) by refusing to recognize the 7-man grievance committee when a subsisting and valid collective bargaining agreement required it to handle grievances through Local 355. The Court of Appeals agreed that "denial of this claim warranted much more explanation than a one-sentence approval of an examiner's conclusion heavily resting on a premise the Board had destroyed" (316 F. 2d at p. 925). The Court held that "we think the Board's order here should be enforced, although we wish the Board had explained its position more thoroughly (316 F. 2d at p. 926). The Court held that Local 355 actually had no grievance committee for the ten days between April 11, when the Local 355 grievance committee resigned, and April 21, when the Local 355 committee was reconstituted, and that

> "In this vacuum the employees were not required to rest their §7 rights on the hope that when a griev-

ance arose, the individual employee affected would somehow manage to obtain a hearing, * * *".

Whatever may be said for this *ratio decidendi*, it was not the one given by either the Trial Examiner or the Labor Board. It was formulated by the Court because of "the unsatisfactory and cryptic nature of the Board's Decision" (316 F. 2d at p. 927, n. 3).

Plainly, the Court of Appeals has enforced the order of the NLRB upon grounds not given in the Board's decision. Such action was inconsistent with principles established in this Court's prior decisions. See *Securities & Exch. Com.* v. *Chenery Corp.*, 332 U. S. 194, *Burlington Truck Lines* v. *U. S.*, —— U. S. ——, 9 L. Ed. 2d 207.

II

Whether Lundy, party to a valid agreement containing a grievance procedure with the bargaining representative of its employees, was under a duty to recognize a non-bargaining-representative grievance committee in the absence of any pending grievance

In view of the existence of the 1958 contract with Local 355, in effect in April and May, 1960, Lundy was not under any duty to "recognize" the 7-man committee. Lundy's duty was to "recognize" only Local 355, the collective bargaining representative of its employees.

The fact that the Local 355 grievance committee resigned on April 11, 1960 and was not reconstituted until April 21, 1960, ten days later, did not create an obligation to "recognize" a non-Local 355 committee in the absence of a grievance.

In sum, Lundy's refusal to recognize the 7-man committee was justified. Therefore, the strike was a wildcat strike, not an unfair labor practice strike.

Under §9(a) of the Act, "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the *exclusive representatives* of all the employees * * *" (italics ours). The fact that a union committee resigned and was not reconstituted for 10 days created no exception to the exclusive representation principle.

The decision below on this question fractures the exclusive representation principle of §9(a) of the Act. It required the employer here to "recognize" two different representatives for the handling of future grievances, (1) Local 355, the collective bargaining representative, and (2) the 7-man committee.

There was no pending grievance. The 7-man committee was not an *ad hoc* committee chosen by an individual employee to present his grievance, as permitted under the proviso to §9(a).

The question is important in the administration of the National Labor Relations Act. It has never been settled by this Court.

The Court below observed (316 F. 2d at p. 926) "The court decision we find most nearly in point, is National Labor Relations Board v. Kearney & Trecker Corp., 237 F. 2d 416 (7 Cir. 1956), not cited by either party." After discussing that decision at some length, the Court below observed (316 F. 2d at p. 926), "The situation here was significantly different from that in Kearney & Trecker."

It seems plain, therefore, that there is no decision in point on the subject. We respectfully submit that the question warrants the consideration of this Court.

III

Whether the Board, having found that unfair labor practices occurred within the limitations period of §10(b) of the Act, may make its order more onerous because of alleged unfair labor practices antedating the limitations period

The Board ordered Lundy to withhold recognition from Local 355—the bargaining representative of Lundy's employees under a valid contract—unless and until that union is certified by the Board.

The Board said, "* * * we have rejected the contention that in every case involving assistance in violation of Section 8(a)(2), we should mechanistically order the employer to cease recognizing the assisted union."

Nevertheless, the Board held that "so broad an order was proper here because of the 'background (prelimitations) evidence, showing that the Respondent coerced its employees into designating Local 355 as their collective bargaining representative, and that Local 355 never was their free choice'" (316 F. 2d at p. 927).

Such an order, we submit, is inconsistent with the proper interpretation of Section 10(b) of the Act and with the application of the principles established by this Court in *Local Lodge* v. *NLRB*, 362 U. S. 411.

The court below, in enforcing the Board's order, found support for the Board's action in this Court's holding that "where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices * * * earlier events may be utilized to shed light on the true character of matter oc-

curring within the limitations period." *Local Lodge* v. *NLRB*, 362 U. S. 411, 416.

With all respect, we submit the quotation is not apropos. This Court was there speaking of the "evidentiary use of anterior events", 362 U. S. at p. 416, not their use to frame an order.

The use of prelimitations events as a basis for a cease-recognition order is substantive, not evidentiary; it penalizes the prelimitations conduct.

By using prelimitations conduct to determine choice of remedy, the Board had penalized the employer for, and has remedied, such conduct. A complaint based on such conduct—proscribed by Section 10(b) of the Act—could do no more.

The Board is doing indirectly what it cannot do directly. In effect, it is punishing Lundy as a second offender in the absence of any prior conviction for a first offense.

Such use of prelimitations conduct violated §10(b) of the Act and the principles established in *Local Lodge*, *supra*.

Conclusion

The writ of certiorari should be issued, the decree below reversed and the matter remanded to the Board.

August, 1963

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